BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES J. VERBANIC	)	
Claimant	)	
VS.	)	
	)	Docket No. **1,058,378**
KC BOARD OF PUBLIC UTILITIES	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

The self-insured respondent requests review of the March 7, 2012, Preliminary Decision entered by Administrative Law Judge (ALJ) Marcia L. Yates. Donald T. Taylor of Kansas City, Kansas, appeared for claimant. David F. Menghini of Kansas City, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of preliminary hearing, with exhibits, dated March 1, 2012, and all pleadings contained in the administrative file.

The ALJ found claimant's work-related injury was the result of repetitive trauma as defined by K.S.A. 2011 Supp. 44-508(e). The ALJ further determined that claimant's date of accident was October 7, 2011, and that claimant provided timely notice to respondent.

ISSUES

Respondent requests review of the following: (1) whether claimant sustained personal injury by accident arising out of and in the course of employment with respondent; (2) whether claimant sustained personal injury by a series of repetitive trauma arising out of and in the course of employment with respondent; (3) whether claimant provided timely notice; and, (4) whether claimant's accident or repetitive trauma was the prevailing factor in causing claimant's injuries, current need for medical treatment, and resulting disability or impairment.

Respondent argues that claimant failed to provide timely notice of his accidental injury since he did not give notice until October 7, 2011, which is more than 30 days after his accidental injury on September 2, 2011.

Claimant argues the ALJ's Preliminary Decision should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

James Verbanic is 62 years old and had been employed for respondent for approximately 20 years. Claimant's job was a wire room coordinator which required that he supply wire to the service employees working in the field. He also kept track of the balances and performed warehouse work, which included gathering materials for work crews using forklifts, dollys and pallet jacks. Claimant's job also required him to frequently climb stairs to retrieve needed material and also be on his feet for "considerable amounts of time."[1]

During the month of September 2011, claimant's hours of work and his workload increased. Claimant first developed problems with his lower extremities during September 2011.

Claimant described the initiation of his symptoms:

> Another individual and myself were using three forklifts to move this material from the rear of the building to the carpenter shop area. What we were trying to do was move the material halfway. Somebody else -- or I'm sorry, my -- the employee that I was working with then picked it up and moved it farther down the line.
>
> So it's kind of like a tandem. So using the three forklifts, I was jumping on and off or getting on and off of different forklifts as we were moving them.[2]

At one particular point on September 2, 2011, claimant got off a forklift and felt stinging in his feet but he continued to work. Respondent required claimant to work some mandatory overtime after the stinging incident. Claimant's foot symptoms increased in severity when he was assisting with inventory on September 16 and 17, 2011. On those dates, claimant was on his feet for extended periods of time which caused swelling and increased pain. In doing inventory, claimant used forklifts and climbed step ladders to access spools of wire.

Claimant's symptoms prompted him to seek medical treatment at the offices of his personal care provider, Dr. David Johnson, on Friday, September 23, 2011. Claimant did not see Dr. Johnson on that date, but instead consulted a physician's assistant, Rebecca Loomis. Claimant was advised to stay off his feet for the weekend and use ice. Ms. Loomis did not take claimant off work, nor did she provide claimant with restrictions.

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[1] P.H. Trans. at 10-11.

[2] *Id*. at 15.

Claimant contacted respondent on Monday, September 26, 2011, and notified respondent that he would be off work due to feet problems. Claimant's decision to stop working was not on the advise of a health care provider.

X-rays were taken of claimant's feet which revealed, according to Dr. Johnson, work-related stress fractures bilaterally. A bone scan was performed on October 21, 2011, which revealed "[a]bnormalties involving the cuneiform bones or proximal metatarsals of both feet which may be seen with osteomyelitis or fracture."[3]

Claimant was referred to a phlebologist, Dr. Barbieri, who found no vascular insufficiency. Claimant also saw Dr. Jeffrey Henning, an orthopedic specialist; Dr. Daniel Shead, a podiatrist; and Dr. Greg Horton, an orthopedic surgeon with a subspecialty in the treatment of feet and lower legs.

Claimant's initial x-rays were evidently taken on Monday, October 3, 2011. Claimant had a follow-up appointment with Dr. David Johnson on Friday, and he took claimant off work. Claimant testified that on October 7, 2011, he talked by telephone to Cindy Nill, respondent's workers compensation specialist, about his foot problems. It was in that conversation that claimant first notified respondent that he was claiming work-related injuries.

Ms. Nill testified that her conversation with claimant in which notice of a work-related injury was first provided occurred on Friday, October 7, 2011. Claimant thinks the day he gave notice to Ms. Nill was earlier, perhaps on October 4, 2011.

When claimant talked to Ms. Nill on October 7, 2011, he told her that he had stress fractures and that it was not a consequence of claimant's diabetes. Claimant explained:

> It was after I found out that I did not have a diabetic problem with my feet, that, in fact, I had problems or stress fractures in my feet that progressively got worse from the 2nd until the 23rd of September.[4]

Claimant was off work from about 2 p.m. on September 23, 2011, until October 5, 2011. He returned to work for respondent on October 5 and 6, 2011, but has not worked since.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508(h):

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[3] *Id*., Cl. Ex. 2 at 3.

[4] *Id*. at 34.

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d) and (e):

(d) 'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

(e) 'Repetitive trauma' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. 'Repetitive trauma' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(g):

'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-520(a):

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

ANALYSIS

The undersigned Board member agrees with the ALJ that claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment with respondent; that the date of injury is October 7, 2011; that the repetitive trauma was the prevailing factor in causing claimant's injuries; and that claimant provided timely notice to respondent.

Claimant does not allege a single accidental injury. Rather, claimant alleges he "sustained repetitive traumas and was taken off work on 10/7/2011."[7] Claimant further alleges that his series of injuries resulted from "[r]epetitive jumping off forklift; up and down stairs and walking on concrete after initial injury."[8] Respondent maintains that claimant suffered only a single accidental injury on September 2, 2011, when claimant felt stinging in his feet after dismounting a forklift and that claimant accordingly did not provide respondent with timely notice.

The definition of "repetitive trauma" set forth in K.S.A. 2011 Supp. 44-508(e) requires that the injury occurred as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.

Claimant's testimony supports the repetitive nature of his injuries. Claimant testified that his bilateral foot pain commenced in September 2011 when claimant's workload increased. Claimant was consequently required to engage in his regular duties for longer periods of time. Claimant's regular duties required that he be on his feet on concrete surfaces for lengthy periods of time; that he get on and off forklifts; that he used pallet jacks; that he climbed steps; and that he retrieved material. The increased workload continued until claimant went to his personal physician's office on September 23, 2011.

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[5] K.S.A. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).

[7] K-WC E-1, Application for Hearing filed November 7, 2011.

[8] *Id.*

Between September 2 and September 23, 2011, claimant's symptoms worsened.[9] In particular, claimant's participation in taking inventory on September 16 and 17, 2011, caused an increase in the severity of the pain in claimant's feet. In addition to increased foot pain, claimant developed swelling.[10] The nature of claimant's regular job duties, his increased workload and the increase in claimant's symptoms from September 2 through September 23, 2011, are consistent with claimant having sustained repetitive trauma arising out of and in the course of his employment during that period of time. The repetitive nature of claimant's injuries was demonstrated both clinically and by diagnostic testing, consisting of plain x-rays and a bone scan.

Respondent points to Dr. Horton's report dated January 26, 2012,[11] to support the notion that only one accident occurred, not a series of repetitive trauma. In his report, Dr. Horton states his impression "that Mr. Verbanic has sustained a tarsometatarsal injury, which for all intents and purposes seems to be causally related to his occupational injury of 9/2/11."[12] Dr. Horton reports that "in summary I think that the prevailing factor in his current symptoms and need for treatment, as well as his work restrictions is the occupational injury of 9/2/11."[13] In the history provided to Dr. Horton, he was advised that claimant was required to work mandatory overtime. The preponderance of the credible evidence, however, does not support respondent's position. Among other evidence, the following support claimant's allegations of repetitive trauma:

(1) Claimant's history to the physician's assistant on September 23, 2011, was that claimant had suffered with bilateral foot pain for three weeks. The same chart entry noted that claimant works on cement and has been working overtime.[14]

(2) Claimant's history to Dr. Johnson on October 7, 2011, was that claimant had been experiencing pain in both feet for five weeks with no known injury. The doctor's records noted that claimant experienced an increase in standing and walking at work, and that, three weeks previously, claimant's work required an increase in walking. The same chart entry refers to "stress fractures, bilateral–work related."[15]

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[9] P.H. Trans. at 34

[10] *Id.*, Resp. Ex. B at 1.

[11] *Id.*, Resp. Ex. B.

[12] *Id.* at 2.

[13] *Id.* at 3.

[14] *Id.*, Cl. Ex. 1 at 4.

[15] *Id.*, Cl. Ex. 1 at 3.

(3) In an undated report[16] prepared by Dr. Johnson, it is stated, under the heading "nature of illness or injury" that claimant's "bilateral foot pain likely to stress fractures from repetitive trauma."[17]

It is unclear from Dr. Horton's report precisely what records were provided for his review, however, he makes no specific reference to the records of Dr. Johnson in the "Review of Records" section of his report.[18] Issues regarding "prevailing factor" are factual in nature and all relevant evidence submitted by the parties must be considered in the determination of such issues.[19] Neither the presence nor the absence of the specific words "prevailing factor" in the evidentiary record is dispositive.

Although there was some discussion that the cause of claimant's foot pain was perhaps related to his preexisting diabetes or venous insufficiency, there is no serious dispute that claimant sustained stress fractures in both feet which are work-related. Respondent does not contend that claimant's stress fractures are not work-related. Respondent does not argue that claimant's work is not the prevailing factor in causing claimant's injuries. Instead, respondent's contention regarding "prevailing factor" is that repetitive trauma was not the prevailing factor in causing claimant's injuries, but instead only the September 2, 2011 event.

This Board member finds that claimant sustained injuries by repetitive trauma arising out of and in the course of his employment with respondent and that such repetitive trauma was the prevailing factor in causing claimant's injuries.

Under K.S.A. 2011 Supp. 44-508(e)(1), (2), (3) and (4), the date of claimant's injury is October 7, 2011. The evidence, including the testimony of Ms. Nill, is that claimant first provided notice to respondent on Friday, October 7, 2011. That date is also when claimant was first taken off work by a physician (Dr. Johnson) and the date claimant was first told, by Dr. Johnson, he had work-related stress fractures, not venous or diabetic conditions. Claimant was not placed on modified or restricted duty by a physician before October 7, 2011.

With regard to notice, K.S.A. 2011 Supp. 44-520, provides three possible methods by which a determination may be made whether notice was or was not timely. In that section, the earliest of the three methods must be utilized. In this claim, there is no need to decide which method is applicable because under all of the three methods, notice is

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[16] Although undated, the report was likely prepared on or near October 7, 2011.

[17] *Id.*, Cl. Ex. 6 at 1.

[18] *Id.*, Cl. Ex. 3 at 3.

[19] K.S.A. 2011 Supp. 44-508(g).

timely. Notice was given on October 7, 2011, within 30 days following the date of accident. Claimant provided notice within 20 days of the date he sought treatment following the date of his injury by repetitive trauma. The third method is inapplicable because, insofar as this record reflects, claimant remains employed by respondent.

CONCLUSION

(1) Claimant did not sustain a single accidental injury arising out of and in the course of claimant's employment with respondent.

(2) Claimant did sustain injury by repetitive trauma which arose out of and in the course of his employment with respondent. The appropriate date of claimant's repetitive trauma is October 7, 2011.

(3) Claimant provided timely notice to respondent.

(4) Claimant's repetitive trauma was the prevailing factor in causing claimant's injuries.

WHEREFORE, the undersigned Board Member finds the March 7, 2012, Preliminary Decision entered by ALJ Marcia L. Yates is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this 24th day of May, 2012.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Marcia L. Yates, Administrative Law Judge